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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 1176

JAMES GALLICK,
Petitioner;

vs.

THE BALTIMORE AND OHIO RAILROAD CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals, Cuyahoga County, Ohio, Eighth Judicial District of Ohio.

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OPINIONS BY COURTS BELOW.

Petitioner, James Gallick, respectfully prays that a writ of certiorari issue to the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District of Ohio, to review the judgment and decision of that Court in Cases Nos. 25017 and 25087 consolidated, entitled *James Gallick v. The Baltimore and Ohio Railroad Co.* The decision of the Court of Appeals dated March 23, 1961, is reported in 86 Oh. L. Abs. 1, 176 N. E. 2d 382 (1961), which opinion of the Court of Appeals is appended hereto as Appendix A. The judgment journal entry of the Court of Appeals dated April 11, 1961, is appended hereto as Appendix B. The judgment of the Court of Appeals reversed a judgment in favor of the petitioner herein which had been entered in his favor in the sum of Six Hundred Twenty-five Thousand Dollars ($625,000.00) upon the special verdict of the jury by the Court of Common Pleas of Cuya-

hoga County. The journal entry of judgment in favor of petitioner by the Court of Common Pleas of Cuyahoga County, which incorporates as part of said journal entry the special verdict of the jury, is appended hereto as Appendix C. The judgment of the Court of Appeals which reversed the judgment of the Court of Common Pleas in favor of petitioner and instead entered final judgment for respondent was bottomed on the single proposition that petitioner's proofs of causal connection fell short of the degree of proof on that issue required by law, hence the trial court erred in not directing a verdict at the conclusion of all of the evidence in favor of respondent, or in the alternative in entering judgment for respondent notwithstanding the verdict.

Petitioner thereupon sought a review of the cause by means of a motion to the Supreme Court of Ohio to direct the Court of Appeals to certify its record to the Supreme Court of Ohio for review, and also seeking a review on Constitutional questions under the Constitution of the State of Ohio and of the United States pertaining to the right of petitioner to a trial by jury in an action brought under the Federal Employers' Liability Act. The jurisdiction of the Supreme Court of Ohio to review the case is found under Article IV, Section 2, Constitution of the State of Ohio. Under these provisions of the Constitution of the State of Ohio, petitioner had no appeal as a matter of right to the Ohio Supreme Court. Review by that Court is discretionary upon the ground that the case is one "Of public or great general interest," or that a debatable constitutional question is involved. The review sought by petitioner raising questions of public or great general interest and constitutional questions was denied by the Ohio Supreme Court. At the same time, respondent likewise sought a review by the Ohio Supreme Court of

the judgment of the Court of Appeals for Cuyahoga County by means of a cross-motion to certify, likewise claiming questions of public or great general interest. The Supreme Court of Ohio, however, refused to take jurisdiction of the cause and issued orders overruling the motion to certify of petitioner, the cross-motion to certify of respondent, and determined that no debatable constitutional question was presented by the judgment of the Court of Appeals. Respondent thereupon filed a motion for a re-hearing on its cross-motion to certify, which motion was denied. Thus, all remedies available through the state judicial system of the State of Ohio have been exhausted by petitioner. The various orders of the Supreme Court of Ohio refusing to take jurisdiction of the case are appended hereto as Appendix D.

Under the Law of Ohio, therefore, the judgment of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District of Ohio, becomes the final judgment of the highest court of the State of Ohio in which a decision can be had. *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300, 37 S. Ct. 653.

JURISDICTION OF THIS COURT.

Jurisdiction of this Court to review the said judgment of the Court of Appeals for Cuyahoga County and to review the constitutional questions raised by petitioner are conferred upon this Court by the Act of June 25, 1947, c. 646, 62 Stat., 929, Title 28, U. S. C. Section 1257. The portions of that section pertinent to jurisdiction of this review provide as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * or statutes * * * the United States."

QUESTIONS PRESENTED FOR REVIEW.

1. In an action under the Federal Employers' Liability Act was the Court of Appeals correct in holding that the proofs of petitioner on the issue of causal connection failed to rise above the level of "speculation and conjecture" when tested by the quantum of proof prescribed by this Court to justify submission of the cause to the jury?

2. By its order of judgment directing a verdict for respondent for the sole reason that the proofs of petitioner on the issue of causal connection failed to rise above the level of "speculation and conjecture," did the Court of Appeals thereupon deny petitioner his constitutional guarantee of trial by jury under the Federal Employers' Liability Act, 45 U. S. C. A., 51?

3. Was the invocation of jurisdictional power by the Court of Appeals to weigh the evidence and thereupon substitute its finding for that of the jury on the issue of legal causation an unlawful exercise by the Court of Appeals of jurisdictional power under the doctrines of appellate review pronounced by this Court in actions brought under the Federal Employers' Liability Act, 45 U. S. C. A., 51?

4. Where an examination of the transcript of testimony in its entirety discloses circumstantial evidence from which the jury could infer the necessary legal causation between respondent's negligence and petitioner's injury, may the Court of Appeals determine as a matter of law

that such evidence is not "proof," but merely "speculation and conjecture," and thereby enter judgment for the respondent as a matter of law after the jury had found for petitioner and judgment upon the verdict of the jury had been entered for petitioner?

5. In an action under the Federal Employers' Liability Act, was the Court of Appeals correct in applying as a legal standard to determine legal causation in an action under the Federal Employers' Liability Act, 45 U. S. C. A., 51, proof of an "efficient" cause?

6. In this action under the Federal Employers' Liability Act, where petitioner adduced proof that his injuries were the result of an insect bite from an insect which could have come from the unsanitary pool of water complained of, was petitioner required to adduce proof that the insect did not come from other sources for which respondent was not liable?

7. In this action under the Federal Employers' Liability Act, were the special findings by the jury of negligence and causal connection supported by credible evidence when correctly tested by principles governing judicial review set forth by this Court?

8. In an action under the Federal Employers' Liability Act, where the jury, in response to specific inquiries submitted to it as a special verdict, found particular acts and omissions of the respondent which in the opinion of the jury consisted negligence, and the jury found a proximate causal relationship between the conditions constituting negligence and the injury to the petitioner, may the reviewing Court of Appeals thereupon set aside a judgment in favor of petitioner entered upon said special verdict for alleged insufficiency of evidence where there is credible evidence in the record to support the findings of the jury?

9. Where the Court of Appeals in its Opinion concedes that by overwhelming testimony the pool of stagnant, vermin-infested water, alongside the tracks of respondent for many years prior to the bite suffered by petitioner contained insects in and about said stagnant pool and that insects of the size described by the injured petitioner might infest said pool and bite a man and that petitioner did in fact suffer a bite on respondent's premises by some insect in the course and scope of employment and from such bite severe consequences to him ensued, may the Court of Appeals thereupon, under the principles of judicial review pronounced by this Court, find prejudicial error to the rights of respondent in submitting said cause to the consideration of the jury on the sole ground that whether the insect causing the damage had any connection with the pool of stagnant water on respondent's premises, or whether it came from other sources on property not owned or controlled by respondent, presented only a series of "guesses and speculations" making a chain of causation "too tenuous" to support a conclusion of liability on the part of respondent.

STATUTES INVOLVED.

The federal statutes involved in this review are those of the Federal Employers' Liability Act, particularly Section 1 thereof (Title 45, U. S. C., Section 51).

Jurisdiction of the federal claim by the state court is provided in Section 6 of the Federal Employers' Liability Act (Title 45, U. S. C. Section 56).

The following statutes of the State of Ohio will aid in an understanding of some of the issues in this appeal: Ohio Revised Code, Section 2315.15, providing for the submission of determinative issues to the jury in a special verdict; Ohio Revised Code, Section 2315.16, providing for the

testing of a special verdict by special interrogatories; and Ohio Revised Code, Section 2315.17 for the rendering of a judgment where a special verdict is tested by interrogatories.

The foregoing federal and state statutes are appended to this petition as Appendix E.

STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against respondent railroad, defendant below, in the Court of Common Pleas of Cuyahoga County, Ohio. The petition after the necessary allegations to invoke the applicability of the Federal Employers' Liability Act, alleged negligence in that defendant knew that by permitting a pool of stagnant water on its premises at Lime Road and the Columbus Road Bridge in Cleveland, Ohio, to accumulate dead pigeons, rats, bugs and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions. Plaintiff further alleged that by reason of such negligence and as a direct and proximate result thereof, he was caused to be bitten by an insect while working in and about said pool of stagnant water in the performance of his employment duties which caused his system to become poisoned and which resulted in the formation of deep, acute ulcerations with draining about his extremities and body, which injuries have necessitated surgery for the amputation of both of his legs, that he is confined to his hospital bed and a wheelchair and will remain so into the indefinite future. Plaintiff alleged other injuries and permanent incapacity from earning wages, for all of which he prayed as damages the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

Defendant, by its answer, admitted that plaintiff's duties for respondent as a yard foreman and yard helper were

in furtherance of interstate commerce and that the work duties of petitioner, during the time alleged, specifically the month of August, 1954, caused him to be present from time to time at or near tracks of respondent located in the vicinity of Lime Road and the Columbus Road Bridge, where the alleged injury occurred. Respondent thereupon pled in its answer to the amended petition certain affirmative defenses which were denied by a reply. The pleadings on which the issues were joined, specifically the amended petition of petitioner, respondent's answer and the reply of petitioner, are all appended hereto. Appendix F.

As already indicated, the trial court submitted certain specific issues to the jury as alleged determinative issues under the special verdict statute of the State of Ohio, Ohio Revised Code, Section 2315.15. Upon consideration of the jury's answers to said determinative issues, the trial court thereupon entered judgment in favor of petitioner. Subsequently, various motions of respondent for judgment on the special verdict, a new trial, or judgment in its favor notwithstanding the verdict of the jury, were overruled by the trial court.

It is important to note that the Court of Appeals in its review of the cause specifically found no error under the laws of the State of Ohio in the admission or exclusion of evidence; the charges of law submitted to the jury; the form of the special verdict or the answers of the jury thereto; the size of the verdict or judgment; or that the special verdict of the jury did not contain findings sufficient to support a judgment for petitioner. *It is crystal clear from the Opinion of the Court of Appeals that if that Court erred in its conclusion that under the law the evidence was insufficient to warrant submission of the cause to the jury in the first place, then in all other respects the judgment in favor of petitioner was proper.* The various

procedural claims of error asserted by respondent were specifically rejected by the Court of Appeals and by the Supreme Court of Ohio in its refusal to take jurisdiction on the cross-motion to certify of respondent and denial of the motion for rehearing of respondent. *Thus, the single issue presented is whether the proofs justify with reason the finding by the jury that respondent's negligence played some part in producing petitioner's injuries.* The Court of Appeals held as a matter of law that the proofs did not. This is the fundamental error which forms the basis for the instant petition for a writ of certiorari.

The transcript of testimony which forms the basis of the record upon which a determination of the sufficiency of the proofs must be made will now be referred to in its important aspects in support of petitioner's claim that it was error to deprive him of his judgment. Numbers as they appear in parentheses refer to page numbers in the typewritten transcript of testimony, i.e., the Bill of Exceptions as it was submitted to the Court of Appeals and to the Supreme Court of Ohio.

STATEMENT OF FACTS AND EVIDENCE.

In brief, by way of background, it may be stated that in August of 1954, while performing his usual duties as a member of a switching crew, petitioner had occasion to walk in a northerly direction under the Columbus Road Bridge in the "Flats" of Cleveland on the west side of respondent's River Track. The River Track was a single track running in part under this bridge. Respondent's right of way included the area on both sides of this track under the bridge. He stopped underneath said bridge for a period of approximately thirty to forty-five seconds to see whether his diesel switch engine was following him

up the track. Upon ascertaining that it was so doing, he took one or two steps again to the north at which time he felt the "bite" of an insect on the back of his left leg just above the knee. Upon feeling the bite he squeezed this area of his leg and felt a crack or pop. Something then rolled down his pants leg about two inches long and half inch in diameter. Opposite to where petitioner was standing, on the east side of said track, was a pool of stagnant water which contained quantities of dead pigeons, dead rats and sundry varieties of crawling and flying bugs, lice and vermin. The stagnant pool underneath the bridge was within respondent's right of way under its possession and control.

William Molnar, a brakeman of fourteen years service with the respondent, who had worked in this area on and off for several years (R. 23, R. 24), described the area as a swamp with dead pigeons, rats and insects as long as he could remember.

> "Q. Is it not a fact, Mr. Molnar, that when those rats and pigeons, the dead rats and pigeons, were lying in that ditch, there were bugs and insects around then, is that not a fact, sir?
>
> A. There is always bugs where the stagnant water was.
>
> Q. Were they there when the rats were there and the dead pigeons were there, Mr. Molnar, is that not a fact?
>
> A. Yes." (Emphasis added.)

Walter Rady, a brakeman employed by the defendant for thirty-nine years during which he worked this area on Saturday and Sunday as a relief man (R. 44) described these conditions substantially the same as Molnar.

William Clason, a yard foreman of fourteen years service, who had worked the Seneca Street job (R. 51, R. 52), corroborated these conditions and further the inadequate maintenance efforts of respondent section crew as follows:

"Q. Is it not a fact that Paul Delaria, the section foreman, had made several attempts to clear this swamp up but was never successful?

A. Yes, he did work on it to drain it.

Q. Sir, please. Read the question. You can answer that, if I have stated a fact to you you say yes, and if I haven't stated a fact you say no.

A. Yes.

Q. Is this not a fact, that the condition was bad several years ago, and was still bad in August of '54, sir?

A. Yes."

Petitioner himself had ten years of experience with respondent as a brakeman or yard foreman (R. 90). He described the conditions underneath the bridge (R. 99) as follows:

"Q. Jim, can you describe the condition underneath the bridge, particularly along the east rail as it was in August of 1954?

A. *Well, there was stagnant water, dead rats, pigeons, with insects flying above and in the water.*

Q. *Were those rats and pigeons in the water?*

A. *In the water and long the rail.*

Q. How long, if you know, had that condition which you now describe existed before August of 1954?

A. As long as I remember.

Q. Well, how long do you remember, Jim?

A. Well, the length of time that I worked for the B & O Railroad, 10 years.

Q. Was it ever cleaned up?

A. I have never seen it cleaned up.

Q. Have you ever complained about it to anyone?

A. Yes, to Paul Delaria, the track foreman.

Q. To Paul Delaria, and he is what?

A. He is the track foreman.

Q. Had you complained about that before August of 1954?

A. Yes, a long time before.

Q. Had you complained about it once or more than once?

A. More than once." (Emphasis added.)

It is clear from the testimony of respondent's section foreman, Paul Delaria, that the river track underneath the Columbus Road Bridge and the drainage of accumulated water, from the swamp area underneath the bridge on the east side of the track to a manhole south of the bridge and also east of the track, was under his jurisdiction for maintenance. This area is depicted by Exhibit 12, the blueprint prepared by Cyril W. Neff, the Civil Engineering expert called by petitioner, and Exhibit M, respondent's aerial photo. Although the Columbus Road Bridge itself is a public bridge the all-important fact is *that control of the drainage underneath the bridge was exclusively under jurisdiction of repondent's maintenance crew headed by Mr. Delaria.*

The measurements of Cyril W. Neff were the only testimony in the entire case purporting to show grade elevations of the area in question. The entire problem with regard to draining the swamp area is summarized by Mr. Neff (R. 231) as follows:

"Q. Mr. Neff, I pointed to the area underneath the bridge, that swamp area we are talking about. Is that lower than the pipe or higher, sir?

A. That area is lower than the pipe.

Q. And is that why it will not flow into the pipe, sir?

A. That is one of the reasons why it won't flow into the pipe.

Q. And could that be eliminated by the filling in of slag that you told us about?

A. Yes, sir."

From the foregoing evidence the jury was certainly justified in finding that on premises under the control of respondent there existed a pool of stagnant water into which were accumulated dead pigeons, dead rats, vermin and bugs. Petitioner was required to perform his work duties in close proximity to said area.

With regard to the unhealthful or unsanitary nature of the foregoing conditions, there is the testimony of Dr. Ippolito (R. 395) as follows:

> "This man was working near a rat-infested pool, with dead rodents in it, and bugs flying in the air. The man was bitten by an insect, and the conditions that followed thereafter. I don't know how I could assume anything else, that the causative agent was this insect bite."

Dr. Ippolito, (R. 396) gave as his professional opinion that some bacteria was introduced into this man's body at the time of the bite, and further testified as follows: (R. 401)

> "I get it from the history of the patient. The patient told me that he was bitten by an organism, by an insect, *and we do know that stagnant pools of water particularly that are infected and have rodents, rats, in them, that insects will go to that area more so than in a dry clean area.*" (Emphasis added.)

Further testimony with regard to the unsanitary and unhealthful nature of this work area is contained in a

portion of the cross examination of Dr. Robin Anderson, (R. 463) who testified as follows:

> "From this point we have our own history in terms of the record. We must carry our basic reasoning back one step further, *and that is that the presence of filth of rats, of dead vermin, of stagnant water, predisposes to disease, predisposes to the growth of insects and the like.*
>
> "This man was bitten in close proximity to such an area of stagnant filth, and it is only logical *and we must assume that the probability is there that whatever it was in the insect, in the bug, is related to the presence of that area.*" (Emphasis added.)

Further, Dr. Anderson testified as follows (R. 467):

> "I can say in terms of medical specialized knowledge, a medical, *a doctor is expected to understand principles of sanitation, and as such we know that the presence of stagnant water is traditionally a breeder of water insects, and we know that the presence of rats implies the presence—or of various insects that feed on it,* such as plague-carrying insects which is the rat flea which lives on the rat both living and dead, and it is the cause of the famous plague episodes in history. We know a certain number of facts which are specialized perhaps in the medical sense but not specialized for an entomologist or an insect expert." (Emphasis added.)

As already noted, the incident occurred after petitioner had been standing for thirty to forty-five seconds a track width opposite the cesspool which contained the filthy conditions already referred to in the performance of his work duties. He then turned around and took a step or two to the north when he felt this bite and cracked or popped what had the feel of a hardshelled insect.

Thus, petitioner (R. 111) testified that he felt pain which was severe in the beginning and that when he

climbed on the footboard of the diesel, he showed it to one of his fellow crew members. When he finished his tour of duty, he had a sensation above the knee on the back of his thigh and washed the area at his locker with soap, a washrag and water (R. 112). When he arrived home at 11:00 o'clock P. M., he was still conscious of the sensation and had his wife look at the rear (R. 113). The area never cleared up and after four or five days, formed a boil (R. 114). The boil burst in the bathtub following which he went to his family doctor, Dr. Heller (R. 114, R. 115). The Marymount Hospital records introduced into evidence and other testimony prove that from this original site the first ulceration developed. This was, of course, corroborated by the petitioner himself.

Mary Gallick, the wife of petitioner, testified that on the night in question, she saw a welt just like when you get a bite which was pink in color and about the size of her nail. The following morning (R. 65), it got deeper in color, a deeper pink. By the fifth day it was larger and real pink and began to raise (R. 66). By the time petitioner went to Dr. Ippolito, the area in question was described by Mrs. Gallick as follows:

> "By that time it was about the size of a half a dollar and it had raised and it had been draining on the side, and it looked very ugly." (R. 67)

Without further encumbering this petition with factual recitations, it is undisputed that when this original lesion failed to heal with conservative treatment, petitioner was hospitalized at Marymount Hospital whereupon a skin graft was instituted and it was only following the initial skin graft that the skin surfaces on both legs began to break down and form ulcerations which thereupon spread to other parts of his body. During this entire

period of time, petitioner was under constant surveillance of trained medical technicians and physicians with daily progress notes recording his confinement at Marymount Hospital and the Cleveland Clinic. These records, which were introduced into evidence, Exhibits 13, 14, 15, 16, 17 and 18, disclose a steady course of disability and debilitation, all stemming from the original lesion. *It is significant to note that the final diagnosis of the Marymount Hospital records recorded after almost two years of continuous hospitalization was "pyodermagangrenosa, secondary to insect bite."*

Respondent's own medical expert, Dr. Davis, testified as follows (R. 742, R. 743):

"Q. *Doctor, is a bite or sting from a bug a trauma?*

A. *Yes.*

Q. What is the meaning of the word trauma?

A. I believe it means an injury.

Q. What is the meaning of the term local trauma?

A. Local trauma means that it happened in a locality of the body rather than to the whole body.

Q. An isolated area.

A. Isolated area.

Q. *Is pyoderma used sometimes instead of pyoderma-gangrenosa?*

A. *Yes, it can be. They do not mean quite the same but they are used together.*

Q. *Do you have an opinion as to whether pyoderma can be caused by trauma?*

A. *Yes, I think it can.*

Q. *Is it one of the recognized causes of pyodermagangrenosa?*

A. *Well, yes, I think it is fair to say it would be a recognized cause."* (Emphasis added.)

It must be emphasized from the foregoing that it was only in the area in and about the Columbus Road Bridge, particularly where the pool of stagnant water was main-

tained, that insects of the approximate size and character which bit petitioner were observed (R. 255, R. 257). No witness testified to having observed similar insects in any other area. We believe that this evidence as herein set forth, under the law, as will be analyzed hereinafter, entitled the jury to make the inference which it did as to a causal connection between the stagnant pool of water, the bugs, the bite which plaintiff sustained and his illness. In this connection again it must be emphasized that both of his treating physicians who testified, i.e., Doctors Ippolito and Anderson, surgeons of unquestioned reputation and qualification, testified that the described conditions were the most likely source of the disease process which infected petitioner and that as physicians it was necessary for them to be familiar with problems of sanitation which would include the problems of disease process bred by dead, putrid animal matter of the type herein described, with insects seen crawling and flying in and about this matter.

ARGUMENT.

Summary.

This petition seeks to correct fundamental errors in the very nature and method of the judicial review indulged in by the Court of Appeals in an action under the Federal Employers' Liability Act, which fundamental errors the Supreme Court of Ohio refused to review, thereby reducing the judgment of the Court of Appeals to a final judgment.

Respondent had sought review from the Court of Appeals of Cuyahoga County upon the judgment in favor of petitioner entered by the trial court and had alleged for the consideration of the Court of Appeals sixteen grounds of error. Most of these grounds concern themselves with

procedural questions particularly, evidentiary questions, instructions of law, the findings of the jury on the special verdict, the amount of damages assessed by the jury, and other issues of trial procedure. All of these alleged grounds of error were carefully considered by the Court of Appeals and as stated in the language of the Court of Appeals, "All other claimed errors have been examined, and we find none prejudicial to the rights of the appellant." The Court of Appeals carefully limited its judgment of reversal to the narrow ground of an insufficiency of evidence from the proofs on the issue of causal connection.

Questions 2, 3, 6, 8.

One of the early fundamental cases in which this Court held that trial by jury is part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act was *Bailey v. Central Vermont Railway Co.*, 319 U. S. 350, 63 S. Ct. 1062 (1943). The *Bailey* case certainly did not prohibit Appellate Court supervision or jurisdiction over a jury verdict, but it did make it plain that action by Trial Courts or Appellate Courts in removing the case from the consideration of the jury by way of a directed verdict in "close or doubtful cases" did violence to the constitutional right under the Federal Constitution of an injured railroad employee to trial by jury. Yet in the instant case the Court of Appeals held the trial judge committed prejudicial error to the rights of respondent in not directing the case, thereupon raising the issue squarely as to whether the record was so devoid of evidence in support of the principal contentions of petitioner as to remove it from the "doubtful or close" category referred to in the *Bailey* case.

While perhaps the standard of a "doubtful or close case" as pronounced in the *Bailey* case might be considered somewhat nebulous in determining the test of a jury case under Section 51 of the Federal Employers' Liability Act, it would certainly seem that after the pronouncement of this Court in *Rogers v. Missouri Pacific Railroad Company*, 352 U. S. 500, 77 S. Ct. 443 (1957), a clear standard of what constitutes a jury case was prescribed. In the *Rogers* case this Court made the now oft-quoted pronouncement:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

Of course, in the *Rogers* case one might argue that the question is still open as to what this Court meant when the so-called "rule of reason" was pronounced. However, the *Rogers* case was decided in 1956, ten years after the earlier case of *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946), in which this Court stated:

> "A measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

The jury with reason could conclude that there was no other logical place for the bug to come from except the pool of stagnant water with the dead rats, pigeons and vermin. This was the only place where such bugs or insects were described by any of the witnesses as having been seen. It was only a track width from the place where petitioner was standing at the time he was bitten. But, even if the bug could have come not only from the stag-

nant pool but from other sources as well, for which the respondent would not be liable, the jury under the foregoing authorities clearly had the right to make the inference that it did in fact come from the pool. The jury having made such inference, it was prejudicial error for the reviewing courts to substitute the inference of the jury for another inference favorable to that of respondent.

Questions 1, 4, 5, 7.

The Court of Appeals determined the test of causation for the within action to be as follows, from page 15 of the Opinion of the Court.

> "The question of causation should not get to the jury, and the Judge should direct a verdict for the defendant, unless the Court is of the opinion that a jury can reasonably find that the defendant's tort was an *efficient* cause of the damage to the plaintiff and not a mere antecedent fact." (Emphasis added.)

We will, of course, agree that if the employer negligence is a mere antecedent fact, petitioner has failed to prove a necessary element in his case; namely, that there be proof of some causal relationship, however slight, between the employer negligence and the injury of the workman. It does not necessarily follow, however, that this degree of causal connection rise to the level of being an "efficient" cause in order to be a basis for recovery. The word "efficient" is defined in the dictionary as meaning immediately effecting; as the efficient cause; hence, effective in causing or producing; as efficient action. It is quite clear, therefore, that although on the one hand the Court of Appeals in its Opinion recognized that common law proximate causation is not required in this action, nevertheless the Court fell into the error of applying this test under another label. There is little to distinguish an

"efficient" cause from a "proximate" cause. A cause to be proximate must be efficient.

The fallaciousness of the test applied by the Court of Appeals to hold that petitioner fell short of proving a case of legal causation may be demonstrated by analysis of many of the recent cases decided by this Court involving this identical issue. A classic illustration that "some" causation as distinguished from "efficient" causation will suffice to sustain the action may be found from the recently decided case of *Davis v. Virginia Railway Co.*, 361 U. S. 354, 80 S. Ct. 387 (1960).

The majority of this Court disagreed with the resolution of this issue by the State Court and held as follows from page 356 of 361 U. S.:

> "We think it should have been left to the jury to decide whether respondent's direction to complete the spotting operation within 30 minutes, plus the experience of the brakemen assigned to perform this 'hot job' *might have* precipitated petitioner's injury. The debatable quality of that issue, the fact that fair-minded men *might reach* different conclusion, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * as well as issues involving uncontroverted evidence * * * to withdraw such a question from the jury is to usurp its function." (Emphasis added.)

With further regard to the *Davis* case, the evidence showed in fact that there was no specific order to even complete the job within 30 minutes. The evidence did show that the conductor was requested to complete his spotting during the lunch hour of the Ford employees and when asked how long the lunch hour of the Ford employees was, the petitioner replied, "Thirty minutes." In any event, this is another illustration that this Court will not tolerate

removing the issue of legal causation from the consideration of the jury under the legalistic label that the evidence would require the jury to indulge in "speculation and conjecture" rather than "proof."

Another good illustration on the degree of causation necessary to sustain the case is *Gibson v. Thompson,* 355 U. S. 18, 78 S. Ct. 2 (1957), involving injuries to an engineer. In the newly constructed yard in which the engineer worked, no walkway had been provided for the 900 foot walk from the roundhouse to yard C. Instead, it was necessary to walk across yards A and B, detouring around equipment and switching movements and progress in those yards. The gravel in the yards was loose and unpacked. It shifted beneath the engineer as he was walking through the yards and he fell and was injured. A jury found that the Missouri Pacific Railroad Company had failed to provide a reasonably safe place in which to work, and the Texas Court of Civil Appeals agreed, but the Texas Supreme Court reversed and ordered judgment for the railroad. That Court said that even though it was bound by Federal Decisions as to what constitutes negligence, *as to sufficiency of the evidence* it had the right to appraise the evidence in accordance with the concept of negligence as announced in prior cases. See 298 S. W. 2d 97, (1957). By this standard, the Texas Supreme Court found no negligence since the railroad had constructed the yard in accordance with specifications of the "best qualified construction engineers in America" and since, though other employees had had similar falls, *no one had ever complained to the railroad about the gravel.* However, again this Court reversed with its oft-repeated general admonition:

> "We hold that the proof justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury."

Even more dispositive of the current law on the issue of legal causation is the recently decided case of *Stinson v. Atlantic Coastline Railroad*, 355 U. S. 62, 78 S. Ct. 136 (1957). The facts as revealed in the State Court decision reported in 96 So. 2d 305 (1957), were that Stinson left his engine, which was on a wrecking job, and went to get something to eat. He was never seen again. His severed body was found across the track three-quarters of a mile from where he had last been seen. The body was nude and his clothes were wadded between the tracks 150 yards away. In Stinson's absence, the fireman had made several movements of the train, in violation of company rules, and had not sounded the bell before doing so, as the company rules required. *The Alabama Supreme Court held that the jury could find negligence from this breach of the company rules, but under the circumstances, in which Stinson's body was found, it held there was no evidence as to what had proximately caused his death, or that it was in the course of his employment.* It thereupon ordered what would be the equivalent of an Ohio directed verdict for the defendant. Again, this Court reversed the Alabama Supreme Court, stating merely that the evidence presented a jury question as to whether Stinson's death resulted in whole or in part from the negligence of the railroad.

Of similar import is *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U. S. 107, 80 S. Ct. 173 (1959) reversing 256 F. 2d 156. In the *Sentilles* case, the seaman brought an action for damages under the Jones Act, 46 U. S. C. A. Sec. 688, claiming damages by reason of being pitched into the air and falling back to the deck of the ship thereupon allegedly activating or aggravating a previous latent tubercular condition. Judgment had been rendered for the seaman in the District Court which was reversed by the Circuit Court of Appeals because the medical testi-

mony as to causal connection between the traumatic incident and the tubercular condition was in the opinion of the Court "speculative and based upon conjecture." Once again, this Court rejected the label of "speculation and conjecture" as a ground for taking away a jury verdict, but held instead, page 109 of 361 U. S.:

> "The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evidenced so shortly after the accident, was in fact caused by the accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proof."

To the same effect, see *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325, 81 S. Ct. 6 (1960) reversing 271 F. 2d 194 (6 C. C. A.). In the *Michalic* case, the claim was that a wrench dropped on the petitioner's foot aggravating an existing Berger's disease. As noted from the opinion, Michalic contended that the proofs were sufficient to justify the jury in finding with reason that there was play in the jaw of the wrench he was using which prevented a tight grip on the nut, thereby entitling the jury to find that respondent, the shipping company, furnished him with a defective wrench. The trial judge found the evidence to be insufficient to present a jury question whether the wrench was a reasonably suitable appliance, *because on the theory that the grip was worn there was never any mention of the grip in the case. The Circuit Court of Appeals took the same view saying there was no evidence that the open or jaw end of the wrench was in any way deficient. The fact that the wrench slipped is not evidence that its slipping was the consequence of some condition in the jaw or han-*

dle in the wrench. The Opinion of the Sixth Circuit Court of Appeals may be found in 271 F. 2d 199. However, this Court stated as follows:

> "We think that both lower Courts erred. True, there was no direct evidence of play in the jaw of the wrench, as in *Jacob v. New York City*, 315 U. S. 752, 754. But direct evidence of a fact is not required. *Circumstantial evidence is not only sufficient but may also be more certain, satisfying and persuasive than direct evidence.*" (Emphasis added.)

There is nothing unusual about the foregoing pronouncement and it can, of course, be said with certainty that both the trial court and the Sixth Circuit Court of Appeals recognized that it is not necessary to have any direct evidence to prove an essential fact in issue. A sufficient degree of circumstantial evidence has always been recognized even in common law as proof of a fact in issue. *The real question is in evaluation of the circumstantial evidence to determine whether in fact the evidence as thus adduced is sufficient to entitle the jury to make the inference of the essential facts or whether it falls below the standard of proof and must be relegated to the role of speculation and conjecture.* It seems that once again the mandate is clear that the decision as to whether the evidence is sufficient to permit an inference of an essential fact, or falls below the standard of proof required, and is mere speculation and conjecture is not, in an F. E. L. A. case, or a Jones Act case, a decision which the Appellate Court may make but is part of the right of the employee to have the jury weigh the evidence. Once there is some evidence of a fact, the question as to whether that evidence is sufficient to entitle the jury to make an inference of a further fact essential to support the cause of action is, under the Federal Employers' Liability Act, a

function strictly for the jury. The jury cannot be deprived of its right to exercise that function by classifying the circumstances as being within the realm of mere speculation and conjecture.

Other cases which might be cited in support of the proposition that an efficient producing cause is not the test to be applied in a Federal Employers' Liability Act case as the standard of legal causation, are *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946); *McBride v. Toledo-Terminal Railroad Co.*, 354 U. S. 517, 77 S. Ct. 1398 (1957); *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957); *Schulz v. Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608 (1956); *Harris v. Pennsylvania Ry. Co.*, 361 U. S. 15, 80 S. Ct. 22 (1959).

Question 9.

This Court has, of course, on frequent occasions held that in the absence of proof of negligence a verdict for petitioner cannot stand. See *Inman v. B & O Railroad Co.*, 361 U. S. 227, 80 S. Ct. 242 (1959); *New York, New Haven and Hartford Railroad Co., v. Hanagan*, 364 U. S. 441, 81 S. Ct. 198 (1960). However, it is equally clear from the authorities already cited that where the proofs justify a finding of negligence, a verdict for petitioner should not be reversed under the standards of judicial review pronounced by this Court on a theory that the causal connection between such negligence and injury is based upon speculation and conjecture, particularly when there is an evidentiary basis in the record for a finding of causal connection.

It should be noted, however, at the outset, that in both the *Inman* and the *Hanagan* cases this Court found no evidence of *negligence*, and that the injuries were in fact brought about by the intervention of a third party over

whom there was no showing that the railroad had any right of direction and control. Neither the *Inman* nor the *Hanagan* cases were concerned with the sufficiency of proof of *causal connection* once the *negligence* of the employing railroad was established to the satisfaction of the Court. *In the instant case, as noted on page 13 of the Opinion of the Court of Appeals, the necessary element of negligence was established from the record to the satisfaction of that Court. Thus, the Court of Appeals stated, page 13:*

> "We can, with reason, say that, to maintain for a period of years a stagnant, vermin-infested pool of water on and over which insects gather, on property where employees are required to work, could furnish the gravamen of an offense under the Federal Employers' Liability Act."

In this connection, it is worthy to note that unlike the *Inman* and *Hanagan* cases no third party is here involved. The negligence was the improper maintenance of its own property by the respondent, and a static condition of many years existence of which, according to the proofs, the respondent had adequate knowledge. It cannot be argued with any degree of fairness that the insect in the instant case, which was merely a transmittal agency, can be likened to the "drunken driver" in the *Inman* case, or the "suicide" in the *Hanagan* case.

At this point it is well to digress and analyze further the Opinion of the Court of Appeals as found on pages 15 and 16 in which the Court fell into the error of concluding that the evidence in support of the inference that the poisonous insect came from the stagnant pool of water fell short of the required degree of proof *because the petitioner had failed to adduce evidence to exclude the fact that it may have come from the nearby putrid mouth of the Cuyahoga River, or from weeds, or unsanitary places situated on property not owned or controlled by the railroad.* It was

for this reason that the Court of Appeals determined that the evidence that it came from the pool of putrid water under the Columbus Road Bridge required guesswork, speculation, or conjecture on the part of the jury. *We feel that any fair reading of the Opinion of the Court of Appeals makes it obvious that what that Court is saying is that there was evidence, as already alluded to in this brief, from which it might have been inferred that the insect became infected from the pool of water and thereupon crawled up petitioner's pants leg and bit him, setting in motion the chain of events which led to his present condition. But there was likewise evidence that the insect may have come from contaminating sources over which the respondent had absolutely no right of control and produced the same result; that to determine from which source this particular insect came would involve pure speculation and conjecture on the part of the jury.* This is but another way of saying that where there are two cause each of which are capable of producing the harm complained of, but for only one of which the defendant would be liable, it devolves upon the petitioner, having the burden of proof, to eliminate the non-liability cause.

However, as already noted from the many citations herein set forth, particularly *Lavender v. Kurn, supra; Rogers v. Missouri Pacific Railroad Co., supra; Harris v. Pennsylvania Railroad Co., supra*; and *Michalic v. Cleveland Tankers, Inc., supra*; the power of the jury to make the inference that the insect came from the liability source, rather than one of the non-liability sources mentioned, is peculiarly a jury function under the law of causation as applied to Federal Employers' Liability Act cases. It was the failure to recognize this role of the jury which forms the fundamental basis of the error of the Court of Appeals as is demonstrated by their use and reliance upon the lan-

guage of "efficient causation" in the Opinion of that Court. The Court of Appeals thus reversed a judgment in favor of petitioner and entered final judgment for respondent on the false premise that petitioner must not only adduce proof of causation but eliminate non-liability causes as well. This common law doctrine which is part of the law of "proximate causation" has repeatedly been repudiated by this Court in Federal Employer Liability Act cases.

In this connection, we believe that the principles of law enunciated by this Court in the leading case of *Tennant, Admx. v. Peoria & P. U. Railway Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944), have peculiar application to the issues raised by the instant petition.

In the *Tennant* case it will be recalled a switchman was killed under circumstances which the Courts below (134 F. 2d 860) held insufficient to establish evidence of causal connection. There were disputing inferences which could reasonably be drawn from the evidence, all as more fully pointed out by this Court on page 33 of its Opinion, 321 U. S. On page 34 of 321 U. S., the Opinion of the Court, the following is contained:

> "In holding that there was no evidence upon which to base the jury's inference as to causation, the Court below emphasized other inferences which are suggested by the conflicting evidence. Thus it was said to be unreasonable to assume that Tennant was standing on the track north of the engine in the performance of his duties. It seemed more probable to the Court that he seated himself on the footboard of the engine and fell asleep. Or he may have walked back unnoticed to a point south of the engine and been killed while trying to climb through the cars to the other side of the track. These and other possibilities suggested by diligent counsel for respondent all suffer from the same lack of *direct* proof as characterizes the one adopted by the jury. But to the extent that

they involve a disobedience of duty by Tennant no presumption of risk or contributory negligence on Tennant's part be presumed in order to negate an inference that death was due to respondent's negligence." (Emphasis ours.)

321 U. S. 35, of the Opinion of the Court:

"It is not the function of a Court to search the record for conflicting *circumstantial* evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the Court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. *The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable* * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury *could* have drawn different inferences or conclusions or because Judges feel that other results are more reasonable." (Emphasis ours.)

It is clear from the caveat of the *Tennant* case that the Court of Appeals fell into the very error admonished against by this Court. Specifically, in removing from the jury its function to select from among conflicting inferences and conclusions that which the jury considered most reasonable, even though there were proofs in the record for the jury to select the very inference which it did, namely, that the bite to petitioner which caused his condition of ill-being was directly connected to the unsanitary conditions maintained by respondent in said pool of stagnant water.

CONCLUSION.

We feel that we have demonstrated from the controlling authorities that there is a sufficiency of proof on the record for the jury to make the inference which it did that petitioner was bitten by an insect which came from a disease-producing filthy pool of stagnant water, improperly maintained by the respondent on its premises under its control, in which for years it permitted dead pigeons and dead rats to accumulate and rot. There was evidence for the jury to conclude that these unsanitary conditions were the producing cause of petitioner's condition of ill-being. By labeling the proof adduced in support of petitioner's claim of a causal connection as "speculation and conjecture," the Court of Appeals did violence to the mandate of this Court that the function of weighing the evidence to determine whether it meets the standard of an inference is purely a function of the jury in this class of case. To remove the cause from the consideration of the jury by reason of a failure of the petitioner to eliminate other sources for which the respondent might not be liable as an efficient-producing cause of the injury was in fact a usurpation of petitioner's rights under the Federal Constitution as an employee in Interstate Commerce to a trial by jury. The determination as to the right to trial by jury has been construed by this Court and required by it to have uniform application throughout the United States. *The Court of Appeals itself having found evidence in the record to support a finding of causal connection between the negligence complained of and the resulting injury had under the law exhausted its function, Lavender v. Kurn, supra.* Its duty then became that of affirming the judgment entered by the trial court *inasmuch as in every other respect the Court of Appeals found no error prejudicial to the appellant railroad.*

RELIEF PRAYED FOR.

By reason of the foregoing, petitioner respectfully prays of this Court that his petition for writ of certiorari to the Court of Appeals for Cuyahoga County, Eighth Judicial District of Ohio, be granted by the Supreme Court of United States; that judgment be thereupon entered by the Supreme Court of the United States as a reversal of the judgment of the Court of Appeals of Cuyahoga County; that this Court reinstate the verdict of the Court of Common Pleas of Cuyahoga County in favor of petitioner entered upon the special verdict of the jury, reduced to judgment in favor of petitioner in the sum of Six Hundred Twenty-Five Thousand Dollars ($625,000.-00), with interest accrued according to law; and that a mandate issue by the Supreme Court of the United States to the Court of Appeals for Cuyahoga County to accordingly reinstate the judgment for petitioner.

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APPENDIX A.

Opinion of the Court of Appeals.

No. 25,087.

IN THE COURT OF APPEALS

EIGHTH JUDICIAL DISTRICT.

STATE OF OHIO, CUYAHOGA COUNTY, SS.

JAMES GALLICK,

Appellee,

v.

THE BALTIMORE AND OHIO RAILROAD CO.,

Appellant.

OPINION.

HUNSICKER, *J.*

James Gallick, an employee of Baltimore and Ohio Railroad Co., brought an action in the Common Pleas Court of Cuyahoga County, Ohio, under the Federal Employers' Liability Act, alleging that he suffered injury because he was not furnished, by his employer, a reasonably safe place to work, and was required to work under unhealthful and unsanitary conditions.

Mr. Gallick, along with other employees of the Baltimore and Ohio Railroad Co., was engaged, over a period (2) of time, at a place known as the "230 Seneca Street job." The location of the work was in the "flats" section of Cleveland, Ohio, a highly-industrialized area adjacent to the Cuyahoga River, a short distance south of the river's entrance into Lake Erie. Specifically, Mr. Gallick, the foreman of the railroad crew, along with others, spotted cars to be moved into the yards, or to industrial establishments. He was required, during the month of August,

1954, to walk along a B & O Railroad right of way, consisting of one line which ran along the river near the industrial plants serviced by such railroad.

This railroad line passed under several bridges, among which was the Columbus Street bridge. Under this bridge, on the east side of the railroad right of way, was a ditch, which, for many years, contained stagnant water, both in the dry and wet seasons of the year. In and about this ditch were dead and decayed rats and pigeons. Insects were seen on, over and about this stagnant pool. The evidence shows that the condition of this pool was known to the employees of the railroad for a long time before the occurrence about which Mr. Gallick complains.

Mr. Gallick, on or about the 10th day of August, 1954, while walking along the west side of the railroad right of way, under and also near the Columbus Street bridge, stopped momentarily to see where the railroad engine was that (3) would pick up some cars. He then took a step or two, at which time he felt a bite on his left leg, a few inches above his left knee. He put his hand on the place where he felt this bite, and grasped between his finger and thumb an object which he said felt like an insect, and which, when squeezed, cracked or popped. This object, or insect, was inside his left trouser leg. When he released the object it slipped out of his left trouser leg. Before he could locate it, the engine was nearby, and he boarded one of the cars. Mr. Gallick said the object was about as long as the width of three fingers, and as thick as his little finger. The size of the insect was thus indicated to be about two inches long by one-half inch wide.

Later that day, after his lunch period, about 7 o'clock, p.m. (Mr. Gallick worked from 3 p.m. until 11 p.m.), he

went to the washroom; and, because he felt some sensation on the back on his left leg, he washed the place where he had felt the bite. When he arrived home after work, he showed this place to his wife, who said it looked like a bite, and that it was pink on the top, and about the size of a fingernail. It grew redder and larger, and, since it did not heal, but broke open like a boil, Mr. Gallick went to a doctor, several days after the alleged bite, who administered penicillin and gave an ointment for dressing the by-now open lesion.

(4) The wound did not respond to treatment, and another doctor was consulted. The condition grew progressively worse, until, after several years of hospital attention by many, many doctors, examinations, tests and treatments, including the amputation of both legs, Mr. Gallick is permanently confined in a hospital suffering from many severe pus-forming lesions on his body. It was stated by one of the doctors who treated him that one arm may have to be amputated to relieve the effect of a lesion in the armpit. None of the doctors who have treated and studied his case can give the etiology of his condition.

One hospital and some of the doctors state the condition of Mr. Gallick to be "pyoderma-gangrenosa, secondary to insect bite."

The trial of Mr. Gallick's action against B. & O. Railroad Company proceeded upon two claimed grounds of negligence: first, "(4) In that it failed to provide plaintiff with a reasonably safe place in which to perform his work duties"; and, second "(6) In that it knew that, by permitting said pool of stagnant water to accumulate dead pigeons, rats, bugs and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions."

Baltimore & Ohio Railroad Company, denying any negligence on its part, said that, if the condition of Mr. Gallick arose from an insect bite sustained by him while working upon railroad property, "the likelihood of harm and consequences" to Mr. Gallick from such bite "were beyond the realm of reasonable probability or foreseeability, with the result that no duty arose requiring the exercise of care by" the railroad "to protect" Mr. Gallick "from any such risk."

After a lengthy trial, and the submission of the case to a jury with a special verdict and numerous interrogatories, a judgment for $625,000 was entered by the Court of Common Pleas.

From this judgment an appeal on questions of law has been brought to this Court by Baltimore and Ohio Railroad Co., which set out sixteen assignments of error, as follows:

"1. The court erred in overruling defendant's demurrer to plaintiff's petition.

"2. The court erred in reducing the seated panel to 10 jurors by excusing two seated members of the jury panel of twelve at the request of the two jurors, after defendant had exhausted its four peremptory challenges to such panel and plaintiff had not exhausted its peremptories, and in proceeding further with the remaining panel of 10 over defendant's objection.

"3. The court erred in limiting the jury's view of defendant's premises and surrounding territory to a very small part of the area which was relevant and pertinent to the issues in the case and about which there was evidence presented at the trial.

"4. The court erred in admitting evidence offered by plaintiff over the objection of this appellant.

(6) "5. The court erred in overruling defendant's motion for judgment on the pleadings, and for a di-

rected verdict at the close of plaintiff's case and at the close of all the evidence.

"6. The court erred in refusing to give to the jury before argument certain written requests to charge submitted by this appellant.

"7. The court erred in submitting to the jury before argument certain special charges submitted by the adverse party and objected to by this appellant.

"8. The court erred in its charge to the jury.

"9. The court erred in refusing to submit to the jury certain special interrogatories to be answered by the jury, as requested by appellant.

"10. The court erred in submitting to the jury an improper, misleading, and incomplete special verdict.

"11. The court erred in entering judgment for plaintiff upon the special verdict returned by the jury, and in not entering judgment for the defendant thereon.

"12. The court erred in overruling appellant's motion for judgment notwithstanding the verdict.

"13. The court erred in overruling appellant's motion for a new trial.

"14. The damages assessed by the jury in its special verdict are excessive and appear to have been given under the influence of passion and prejudice.

"15. The damages assessed by the jury are excessive and not sustained by the evidence.

"16. Other errors occurring at the trial and in the judgment."

(7) We do not believe it necessary to discuss in detail each of the assigned errors, but, since this matter is brought under the Federal Employers' Liability Act, our consideration of the problem posed by these assignments of error must be controlled by the interpretation of such act by the Supreme Court of the United States. *Dice v.*

Akron, Canton & Youngstown Rd Co., 91 O. App. 239; *Dice v. Akron, Canton & Youngstown Rd. Co.*, 342 U. S. 359; *Harris v. Pennsylvania Rd. Co.*, 198 O. App. 541.

> "Under this statute [45 U. S. C. A., Sec. 51] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."
>
> *Rogers v. Missouri Pacific Rd. Co.*, 352 U. S. 500, at 506; 77 S. Ct. 443.

The usual concept of proximate causation, as we know it in the law of Ohio, is not to be applied in cases such as we have herein, which arise under the Federal Employers' Liability Act. *Rogers v. Missouri Pacific Rd. Co., supra; Schulz, Admx., v. Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608.

With these preliminary and fundamental statements of the rules we must follow in determining the instant case, let us examine the special findings of the jury to see what they found as to the determinative issues.

(8) The determinative issues may be briefly summarized as follows: Is there some credible evidence to support a finding of employer negligence? Did such negligence play any part, even the slightest, in producing the "bite" suffered by Mr. Gallick?

We are required, in examining the special finding of a jury, to liberally construe the answers with a view to ascertaining the meaning of such answers. *Klever v. Reid Brothers Express, Inc., et al.*, 151 O. S. 467, 86 N. E. 2d 608; *Elio v. Akron Transportation Co.*, 147 O. S. 363, 71 N. E. 2d 707.

The rule announced by the Supreme Court of the United States, with reference to the effect of local practice rules, such as the interpretation of interrogatories, is found

in *Arnold v. Panhandle & Santa Fe Railway Co.*, 353 U. S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840, wherein that court said that the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

There are inconsistencies in the answers to the special verdict and the interrogatories made by the jury in the instant case. They did find, however, that the Baltimore and Ohio Railroad Co. was negligent in maintaining the stagnant pool by the side of its track. Although the jurors stated that they could not answer the question as to Mr. Gallick (9) being furnished a safe place to work, they did find a cause and effect relationship between the stagnant pool and the bug bite suffered by Mr. Gallick. After its affirmative answer to the proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite, and the present physical condition of the plaintiff, the jury found no reasonable probability or foreseeability of the Baltimore and Ohio to appreciate this proximate causal relationship between the stagnant water and other conditions leading to the present physical condition of Mr. Gallick.

Are such findings of the jury sufficient to sustain the judgment? It is difficult to reconcile the several pronouncements of the Supreme Court of the United States with reference to the application of the Federal Employers' Liability Act. A liberal attitude on the part of the court majority is apparent, but an adherence to fixed principles is not readily discernible. 69 *Harvard Review* 1441.

In many of the cases which we have examined, the causative factor has been some tangible object owned by the railroad, even though it was only gravel or an oversized cinder in the roadbed. *Webb v. Illinois Central Rd. Co.*, 352 U. S. 512, 1 L. Ed. 2d 503; *Ferguson v. Moore-*

McCormack Lines, Inc., 352 U. S. 521, 1 L. Ed. 2d 511; *Lavender, Admr., v. Kurn, et al.*, 327 U. S. 645, 90 L. Ed. 916.

(10) In the instant case, as well as in *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 4 L. Ed 2d 142; *Schulz, Admx., v. Pennsylvania Rd. Co.*, 350 U. S. 523, 100 L. Ed. 668; and *Inman v. Baltimore & Ohio Rd. Co.*, 361 U. S. 138, 4 L. Ed. 2d 198, that which caused the injury was an outside force, such as unusual wave, ice on a boat, or a third person.

Through all these cases there runs the underlying general principle that, before a plaintiff may recover damages, there must be proof of some causal relationship between the employer negligence and the injury or death of the workman.

In *Tennant, Admx., v. Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, 88 L. Ed. 520, the court said:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line R. Co., 318 US 54, 67, 87 L. ed. 610, 617, 63 S. Ct. 444, 143 ALR 967.
>
> "Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' Galloway v. United States, 319 US 372, 395, 87 L. ed. 1458, 1473, 63 S. Ct. 1077; Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 351, 74 L. ed. 896, 50 S. Ct. 281."

In the recent case of *Inman v. Baltimore & Ohio Rd.* (11) *Co.*, 361 U. S. 138, 4 L. Ed. 2d 198, the court, after cit-

ing with approval the case of *Rogers v. Missouri Pacific Rd. Co.*, 352 U. S. 500, 1 L. Ed. 493, said: "The Act does not make the employer an insurer."

In the *Rogers v. Missouri Pacific Rd. Co* case, *supra*, there is an apparent reversal by the court of its position stated in *Tennant, Admx., v. Peoria Pekin Union Ry Co.*, *supra*, and quoted above, wherein a "proximate cause in whole or in part" is necessary before recovery by an injured employee of the railroad. In the *Rogers v. Missouri Pacific Rd. Co.* case, the court, after rejecting the rule of proximate causation, said, with regard to this question,

> "* * * That is language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury.
>
> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly (12) imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to negligence. (Emphasis added.)
>
> "The law was enacted because the Congress was dissatisfied with the common-law duty of the master

to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence.

"The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question, whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

We do know by overwhelming testimony that the pool of stagnant, vermin-infested water was alongside the Baltimore and Ohio tracks for many years prior to the alleged "bite" suffered by Mr. Gallick. We know, by definite evidence, that insects were in and about this stagnant pool. There is a conflict in the testimony (resolved against Baltimore and Ohio) as to whether any insect of the size described by the injured employee might infest this pool, and which insect might "bite" a man.

We have sufficient credible evidence to conclude, as did the jury, that Mr. Gallick suffered a "bite" on railroad property by some insect while working for that railroad. We have an abundance of testimony that from such "bite" severe consequences to Mr. Gallick have ensued.

(13) We can, with reason, say that, to maintain for a period of years a stagnant, vermin-infested pool of water on and over which insects gather, on property where its employees are required to work, could furnish the gravamen of an offense under the Federal Employers' Liability Act.

No similar "bite" or other insect bites were ever complained about, although complaint about the general un-

sanitary condition at the location of the pool was made to the railroad.

Throughout all the cases involving employer liability, in cases such as we have before us, the United States Supreme Court has held that a right to recover is established if, from the facts proved, negligence and its causal relationship to the injury and damage may reasonably be inferred; a jury question is presented if, with reason, "the conclusion may be drawn that negligence of the employer played any part at all in the injury."

From the facts heretofore set forth, it is obvious that the plaintiff's case, if it is to be sustained, must rest upon inferences to be drawn from the evidence. There is no direct evidence that the existence of the unidentified bug at the time and place had any connection with the stagnant and infested pool.

We observe that proof is the effect of evidence—the establishment of a fact by evidence—and in litigation (14) there may be evidence which does not amount to proof. When there is neither direct evidence, nor reasonable inferences to be drawn from evidence, whether direct or circumstantial, a conclusion based upon such absence of evidence or reasonable inference is mere conjecture, and the drawing of a further inference from conjecture does not amount to proof. In proving a defendant's culpability, the proof must show that the tort is distinctly traceable as one of the efficient antecedents of the damages, and has a share in subjecting plaintiff to injury.

The observation made above refers only to legal cause. We are not here concerned with cause in the so-called "philosophic sense," for the reason that the causes of causes are infinite.

If the plaintiff's case is to be sustained, we must infer that this undescribed (except as to size and biting quali-

ties) insect or bug had been attracted to the area in which the plaintiff was hurt by the stagnant pool, and that its bite caused the plaintiff's condition; that the pool created conditions and influences which helped to incubate or furnish an environment for the bug, whose bite was poisonous to the plaintiff; or, that the insect, having traveled from other areas, became contaminated or infected by the pool with a substance injurious to man, and that this substance infected the plaintiff when bitten.

(15) The law is plain that, before the question of causation can be submitted to a jury, the trial judge must decide a preliminary question—*i.e.*, whether from the evidence a jury could reasonably find the existence of a causal relation. If the judge decides in the affirmative, it will then be for the jury to say whether they do find. In other words, the judge must say whether on the evidence, a causal relation may be reasonably inferred. If the judge rules that it may be so inferred, the jurors then must say whether, from the evidence, the causal relation is inferred by them.

The question of causation should not get to the jury, and the judge should direct a verdict for the defendant, unless the court is of the opinion that a jury can reasonably find that the defendant's tort was an efficient cause of the damage to the plaintiff *and not a mere antecedent fact.*

As we view the record before us, we have a chain of possibilities that the negligence of the defendant might have shared in subjecting the plaintiff to damage and injury, but the proof of a legal causal connection between the negligence and damage falls short of that required for the consideration of a jury.

Whether the insect causing the damage had any connection with the pool of stagnant water on the defendant's premises, or whether it came from the nearby putrid mouth of the Cuyahoga River, or from weeds, or unsani-

tary places situated (16) on property not owned or controlled by the railroad, presents only a series of guesses and speculations, which speculations make a chain of causation too tenuous to support a conclusion of liability on the part of the railroad.

We determine, therefore, that, where there is, as here, only a guess or speculation of a causal connection between the negligence of the employer and the injury of an employee, no liability attaches, and a judgment based upon such speculation cannot be sustained.

All other claimed errors have been examined, and we find none prejudicial to the rights of the appellant.

The judgment herein is reversed as contrary to law, and final judgment will be entered for the railroad-appellant.

Reversed and final judgment for the appellant.

DOYLE, *P. J.*, and GRIFFITH, *J.*, concur.

(Doyle, *P. J.*, and Hunsicker, *J.*, of the Ninth District, and Griffith, *J.*, of the Seventh District, sitting by designation in the Eighth District.)

APPENDIX B.

Journal Entry of the Court of Appeals.

April 11, 1961:

This day this cause, having been previously consolidated with case No. 25,017, came on to be heard upon appeal on questions of law, assignments of error, bill of exceptions, pleadings, transcript of the docket and journal entries in the Court of Common Pleas of Cuyahoga County, Ohio, and briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, this Court finds that in the record and proceedings aforesaid there is error manifest upon the face of the record to the prejudice of the appellant, in that the Court of Common Pleas erred:

(1) In overruling appellant's motion for a directed verdict at the close of all the evidence.

(2) In overruling appellant's motion for judgment notwithstanding the verdict.

and in that said Court entered judgment for appellee when such judgment should have been entered for the appellant.

It is therefore considered, ordered, and adjudged by this Court that the judgment of the Court of Common Pleas of Cuyahoga County be and the same is hereby reversed and held for naught. And the Court coming now to render the judgment which the Court of Common Pleas of Cuyahoga County ought to have rendered, final judgment is now entered in this Court for the appellant.

It is further ordered that this cause be remanded to the Court of Common Pleas of Cuyahoga County, Ohio, to carry this judgment into effect and for execution; and that the appellant recover from the appellee its costs herein expended, taxed at $_____. To all of which, appellee, by counsel, excepts.

All other claimed errors have been examined, and this Court finds none prejudicial to the rights of the appellant. To which appellant, by counsel, excepts.

APPENDIX C.

Journal Entry of the Court of Common Pleas.

The Court finds that the jury in the within cause was duly impanelled and sworn; that proper request was made to the Court by the defendant for a special verdict as provided by law; and that a special verdict was returned by the jury.

The Court further finds that the photographic copies annexed hereto as Exhibits "A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W" are an exact reproduction of the original special verdict returned by the jury and made a part of the record of the within case; and that said Exhibits annexed hereto as Exhibits A through W constitute the verdict of the jury.

The Court being fully satisfied that Exhibits A through W annexed hereto constitute the verdict of the jury, the Court hereby incorporates the same by reference as part of this Journal Entry as though expressly rewritten herein.

The Court further finds that proper request was made by the defendant for the submission of a separate finding of fact by the jury and that Exhibit "X" annexed hereto is an exact photographic copy of the finding of fact of the jury. The Court therefore incorporates Exhibit "X" as annexed hereto as a part of this Journal Entry as though expressly rewritten herein.

The Court being of the opinion that the special verdict of the jury as referred to and incorporated within this Journal Entry and annexed hereto as Exhibits A through W is sufficient in law to require a judgment for the plaintiff; and the jury by said special verdict having found that plaintiff's damages are Six Hundred Twenty-Five Thousand Dollars ($625,000.00); and the Court being of the opinion that the finding of fact of the jury, as referred to

and incorporated within this Journal Entry and annexed hereto as Exhibit "X" is consistent with the verdict of the jury; it is hereby ordered that plaintiff recover of the defendant the said sum of Six Hundred Twenty-Five Thousand Dollars ($625,000.00), for which sum, with the costs of this action, judgment is hereby rendered in favor of plaintiff and against the defendant.

Special Verdict.

EXHIBIT A.

We, the jury, being first duly impanelled and sworn and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence, the following determinative issues in this cause:

1. Did a pool of stagnant water exist under the Columbus Road Bridge during the entire early part of August, 1954? Yes.

(Names of twelve jurors omitted.)

EXHIBIT B.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

2. Was the pool of stagnant water on the premises of the defendan. B. & O.? Yes.

(Names of twelve jurors omitted.)

EXHIBIT C.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number

thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

3. If the answer to 2 is yes, was the defendant B. & O., in possession of the premises under the Columbus Road Bridge whereon the stagnant water stood? Yes.

(Names of twelve jurors omitted.)

EXHIBIT D.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

4. Did the defendant B. & O. have under its control the premises under the Columbus Road Bridge wherein the stagnant water stood? Yes.

(Names of twelve jurors omitted.)

EXHIBIT E.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

5. If the answer to question No. 2 is yes, did dead pigeons accumulate under the bridge in the stagnant water? Yes.

(Names of ten jurors omitted.)

EXHIBIT F.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

6. If the answer to No. 2 is yes, did dead rats accumulate under the bridge in the stagnant water? Yes.

(Names of nine jurors omitted.)

EXHIBIT G.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

7. If the answer to No. 2 is yes, did vermin accumulate under the bridge in the stagnant water? Yes.

(Names of twelve jurors omitted.)

EXHIBIT H.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

8. If the answer to No. 2 is yes, did bugs accumulate under the bridge in the stagnant water? Yes.

(Names of twelve jurors omitted.)

EXHIBIT I.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

9. Was plaintiff required to perform his work duties in close proximity to the area referred to in question No. 1? Yes.

(Names of twelve jurors omitted.)

EXHIBIT J.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

10. On approximately August 10, 1954, was plaintiff bitten by an insect? Yes.

(Names of twelve jurors omitted.)

EXHIBIT K.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

11. If the answer to Question No. 10 is yes, was he bitten while performing his usual and customary work duties? Yes.

(Names of twelve jurors omitted.)

EXHIBIT L.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

12. If the answer to No. 10 is yes, was he bitten near or about the Columbus Road Bridge? Yes.

(Names of twelve jurors omitted.)

EXHIBIT M.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number

thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

13. Did the defendant B. & O., provide the plaintiff, Mr. Gallick, a reasonably safe place to work under the facts and circumstances existing at the time?

Jury can't decide on this question.

EXHIBIT N.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

14. If the answer to question 1 is yes, did the defendant B. & O. know that by permitting the accumulation of said pool of stagnant water, dead pigeons, dead rats, bugs and vermin would be attracted to said area? Yes.

(Names of ten jurors omitted.)

EXHIBIT O.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

15. If the answer to 14 is yes, did the defendant B. & O. know that its employees would have to work in this area? Yes.

(Names of ten jurors omitted.)

EXHIBIT P.

We, the jury being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

16. Was the defendant negligent in one or more of the particulars alleged in the petition? Yes.

(Names of twelve jurors omitted.)

EXHIBIT Q.

We, the jury being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

17. If the answer to Question 16 is yes, indicate in the words of the petition the acts or omissions which constitute defendant's negligence.

There existed a pool of stagnant water on premises in the possession of and under the control of defendant into which was accumulated dead pigeons, rats and various forms of bugs and vermin.

(Names of ten jurors omitted.)

EXHIBIT R.

We, the jury being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

18. Was the illness or disease from which Mr. Gallick now suffers caused in whole or in part by an insect bite sustained by him on defendant B & O's premises? Yes.

(Names of twelve jurors omitted.)

EXHIBIT S.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

19. Were the injuries to the plaintiff proximately caused in any part, even the slightest, by any one or more of the acts or omissions of the defendant? Yes.

(Names of twelve jurors omitted.)

EXHIBIT T.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

20. If the answers to any one of the questions numbered 1, 5, 6, 7, and 8, is yes, was there any reason for the defendant B. & O., to anticipate that such would or might probably result in a mishap or an injury? No.

(Names of ten jurors omitted.)

EXHIBIT U.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

21. Was there a proximate causal relationship to the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff? Yes.

(Names of twelve jurors omitted.)

EXHIBIT V.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

22. If the answer to Question 21 is yes, was it within the realm of reasonable probability or foreseeability of the defendant B. & O. to appreciate this proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff? No.

(Names of twelve jurors omitted.)

EXHIBIT W.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

23. What amount of money will compensate the plaintiff, James T. Gallick, for his injuries and damages, if any, resulting proximately from this accident?

$26,000.00.

(Names of twelve jurors omitted.)

EXHIBIT X.

Interrogatories.

5(a) Where on plaintiff's body was his first skin infection?

Answer: Back of left leg approximately 4" above knee—more to the outside.

(Names of twelve jurors omitted.)

APPENDIX D.

Orders of the Supreme Court.

Dec. 6, 1961:

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the defendant-appellee recover from the plaintiff-appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

Motion for an Order Directing the Court of Appeals for Cuyahoga County to Certify its Record.

Dec. 6, 1961:

It is ordered by the Court that this motion is overruled.

Cross Motion for an Order Directing the Court of Appeals for Cuyahoga County to Certify its Record.

Dec. 6, 1961:

It is ordered by the Court that this motion is overruled.

THE SUPREME COURT OF OHIO

COLUMBUS.

January 10, 1962

Mr. A. H. Dudnik
Attorney at Law
Engineers Building
Cleveland, Ohio

Re: James Gallick, appellant, v. The Baltimore and Ohio Railroad Company, appellee
Case No. 37218

Dear Mr. Dudnik:

We are directed by the Supreme Court to advise counsel in this case that the Court has considered the application for rehearing, filed therein, and that a rehearing is denied.

Sincerely yours,

JOHN MCCONNELL.

APPENDIX E.

Statutes Involved.

Title 45, U. S. C., Section 51.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

Title 45, U. S. C., Section 56.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143 § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167, Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

Ohio Revised Code, Section 2315.15.

When requested by either party, the court shall direct the jury to give a special verdict in writing, upon any issues which the case presents.

Ohio Revised Code, Section 2315.16.

When either party requests it, the court shall instruct the jurors, if they render a general or special verdict, specially to find upon particular material allegations contained in the pleadings controverted by an adverse party, and submitted by the court in writing, to the jury, and shall direct the jury to return a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk.

Ohio Revised Code, Section 2315.17.

When a special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly.

APPENDIX F.

Amended Petition.

No. 697,202.

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

JAMES GALLICK,

Plaintiff,

vs.

THE BALTIMORE AND OHIO RAILROAD CO.,

Defendant.

AMENDED PETITION.

Now comes the plaintiff and after having duly obtained leave of court files this his amended petition. Plaintiff for his cause of action says that at all times herein alleged the defendant was and is a railroad corporation, organized and existing under the laws of the State of Maryland, and was at the time of the occurrence herein set forth and is now carrying on its business as an interstate common carrier of passengers and freight within the jurisdiction of this court; that at all times herein alleged, plaintiff was and is a resident of the City of Parma, County of Cuyahoga and State of Ohio, employed by the defendant as a Yard Foreman, in which capacity the plaintiff was engaged in the movement, switching and classification of freight cars on tracks of the defendant located in the vicinity of Lime Road and the Columbus Road Bridge in the City of Cleveland, County of Cuyahoga, State of Ohio; that the action of plaintiff is brought under, and is governed by the provisions of the Federal Employers' Liability Act,

45 USCA, Sections 51-59 and Amendments thereto; that the work duties of the plaintiff at all times herein alleged substantially affected and were in furtherance of interstate commerce.

Plaintiff further says that in the month of August, 1954, the exact date and time being uncertain, he was engaged in the performance of his duties involving the movement, switching and classification of railroad freight cars at defendant's tracks located in vicinity of Lime Road and the Columbus Road Bridge in the City of Cleveland, County of Cuyahoga, State of Ohio; that in close proximity to said tracks in August of 1954, and for a long time prior thereto to the knowledge of the defendant, there existed a pool of stagnant water on premises in the possession of and under the control of defendant into which was accumulated dead pigeons, rats and various forms of bugs, lice and vermin; that plaintiff was required to perform his work duties in close proximity to said area; that in the month of August, 1954, while performing his usual and customary work duties in and about the Columbus Road Bridge and Lime Road tracks of defendant, the plaintiff was bitten by an insect following which he developed serious, painful and disabling injuries as will be described hereinafter.

Plaintiff further says that the defendant was negligent in the following respects:

1. In that it required plaintiff to perform his work duties in close proximity to an area which was known by the defendant to be infested with dead pigeons, rats, bugs, lice and vermin.

2. In that it failed to drain said stagnant pool of water which would have eliminated the hazard to the health of the employees compelled to work in the vicinity of said area and more particularly, this plaintiff.

3. In that it failed by the use of chemicals or otherwise to eliminate from the said area where plaintiff was required to work the accumulations of dead pigeons, rats, bugs, lice and vermin, although it knew of said condition which existed for many years prior to the injury to plaintiff.

4. In that it failed to provide plaintiff with a reasonably safe place in which to perform his work duties.

5. In that it failed to inspect and spray the empty freight cars being moved, switched or classified in the vicinity on the track of the defendant near Lime Road and the Columbus Road Bridge to rid the same of insects, bugs, lice and vermin.

6. In that it knew that by permitting said pool of stagnant water to accumulate dead pigeons, rats, bugs, and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions.

Plaintiff further says that by means of and in consequence of the foregoing negligent acts and omissions of the defendant, and as the direct and proximate result thereof, he was caused to be bitten by an insect which caused his system to become poisoned and which resulted in the formation of deep, acute ulcerations with draining about his extremities and body, which condition has not abated with time.

Plaintiff further says that as a result of his injuries, it had been necessary for him to undergo extensive hospitalization, medical care and attention, and surgery, for all of which he has sustained expense, the full extent and amount of which is, as yet, unascertainable inasmuch as plaintiff is receiving medical care and attention and hospitalization at the time of filing this, his amended petition.

Plaintiff further says that his injuries have necessitated surgery for the amputation of both legs, that he is

confined to his hospital bed and a wheel chair and will remain so into the indefinite future.

Plaintiff further says that his injuries have caused him to suffer an extreme weight loss and necessitated that he consume large quantities of narcotics in an attempt to relieve his pain.

Plaintiff further says that as a result of his injuries, he has suffered and will suffer permanently from pain, great mental anguish, extreme nervousness, an inability to obtain normal rest, weight loss, cosmetic disfigurement, an inability to get about, and extreme worry, grief and anxiety.

Plaintiff further says that his injuries have rendered him an invalid and that he needs constant care and attention to his person.

Plaintiff further says that prior to the foregoing occurrence, he was regularly employed, earning and capable of earning substantial wages but that as a result of his injuries, as aforesaid, he has been rendered totally incapacitated from resuming his railroad occupation or any other gainful occupation which condition will continue into the indefinite future.

By means of and in consequence of which plaintiff has been injured and damaged in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

WHEREFORE, plaintiff prays judgment from the defendant herein in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

A. H. DUDNIK,
MEYER A. COOK,
Attorneys for Plaintiff.

Answer to Amended Petition.

First Defense.

Now comes defendant and for its first separate defense to plaintiff's amended petition admits that it is a railroad corporation organized and existing under the laws of the State of Maryland, and maintains certain tracks in the vicinity of Lime Road and the Columbus Road Bridge in the City of Cleveland, Ohio; admits that during the month of August, 1954, plaintiff was employed by defendant in the capacities of yard foreman and yard helper, engaged in the movement, switching, and classification of freight cars over certain tracks of defendant located in the City of Cleveland; admits that plaintiff's cause of action is brought under the provisions of the Federal Employers' Liability Act, 45 U. S. C. A. §§ 51-59, as amended; and admits that plaintiff's duties as yard foreman and yard helper were in furtherance of interstate commerce.

Not intending to deny that plaintiff may have been required in the course of his duties as yard foreman or yard helper to be present from time to time during the month of August, 1954, at or near the tracks of defendant which are located in the vicinity of Lime Road and the Columbus Road Bridge, or that plaintiff has suffered from a serious and painful disability subsequent to August, 1954, plaintiff does deny for lack of knowledge that there existed at that time a pool of stagnant water or other unsanitary condition for which the defendant was responsible in the vicinity of its tracks at Lime Road and the Columbus Road Bridge; denies that plaintiff's illness or disease was proximately caused or contributed to by the negligence of this defendant, its agents, servants, or employees, either in the respects alleged in the amended petition or in any other manner, and specifically denies

the existence of any connection whatsoever between the condition of defendant's tracks and roadbed and the insect bite allegedly sustained by plaintiff while employed as a yard foreman or yard helper for defendant during the month of August, 1954.

Further answering, defendant says that if it be true that the illness or disease from which plaintiff now suffers was caused or contributed to by an insect bite sustained by him on defendant's premises or elsewhere, the likelihood of harm and consequences to plaintiff therefrom were beyond the realm of reasonable probability or foreseeability, with the result that no duty arose requiring the exercise of care by defendant to protect plaintiff from any such risk, and defendant further says that if it should be found that such risk should have been foreseen by this defendant, no reasonable method or means was available to it which could have eliminated, controlled, or appreciably reduced the numbers or types of insects in and about its premises.

Further answering, defendant denies each and every allegation contained in plaintiff's amended petition save and except those hereinabove expressly admitted to be true.

SECOND DEFENSE.

For its second separate defense to plaintiff's amended petition, defendant incorporates herein by reference and makes a part hereof the preceding portions of this its answer and says that if it should be found that plaintiff's disability was caused in whole or in part by the negligence of this defendant, which defendant specifically denies, then neither said disability nor the insect bite which is claimed to have occasioned it constitutes an "injury"

within the meaning of the Federal Employers' Liability Act, and that plaintiff may not recover in this action.

WHEREFORE, having fully answered, defendant prays that plaintiff's amended petition be dismissed and that it may go hence with its costs without day.

BAKER, HOSTETLER & PATTERSON,
Attorneys for Defendant.

Reply.

For his Reply to the Answer of the defendant to plaintiff's Amended Petition, plaintiff denies each and every fact, statement and allegation contained therein save and except such as are an admission of a fact, statement or allegation contained in the Amended Petition of Plaintiff.

For his further Reply plaintiff re-alleges and re-avers the facts, statements and allegations contained in his Amended Petition, and prays for judgment as in his Amended Petition he has prayed.

A. H. DUDNIK,
Attorney for Plaintiff.